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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

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No. 623.

YU CONG ENG and CO LIAM for themselves and for the benefit of all other persons similarly situated and affected,

Petitioners,

against

W. TRINIDAD, as Collector of Internal Revenue, EULOGIO P. REVILLA, as Fiscal for the City of Manila and PEDRO CONCEPCION, as Judge of the Court of First Instance of Manila,

Respondents.

BRIEF ON BEHALF OF PETITIONERS.

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IN THE

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OCTOBER TERM—1925.

YU CONG ENG AND CO LIAM for themselves and for the benefit of all other persons similarly situated and affected, Petitioners, vs. W. TRINIDAD, as Collector of Internal Revenue, EULOGIO P. REVILLA, as Fiscal for the City of Manila and PEDRO CONCEPCION, as Judge of the Court of First Instance of Manila, Respondents.	No. 623.

BRIEF ON BEHALF OF PETITIONERS.

(ITALICS THROUGHOUT ARE OURS.)

Nature of the Case.

This case involves a petition for prohibition and injunction against the enforcement by criminal prosecution of a penal law of the Philippine Islands known as the "Chinese Bookkeeping Law." This law renders it unlawful for any business house in the Philippines

> "to keep its account books in any language other than English, Spanish or any local dialect."

Petitioner Yu Cong Eng, upon being prosecuted criminally under the law for keeping his account books in Chinese characters, sought injunction and prohibition from the Supreme Court of the Philippine Islands against the lower court and the prosecuting officials, joining with him as petitioner Co Liam, for the benefit of all other persons similarly situated and affected. Petitioners attacked the law as unconstitutional in that it sought to deprive them and the other Chinese of their liberty and property without due process of law and to deny to them the equal protection of the laws.

The Philippine Supreme Court entertained jurisdiction of the original petition thus presented, and, whereas it conceded the unconstitutionality of the law as written, was able to so construe the legislation as to satisfy a majority of that Court of its constitutionality.

Upon the motion of the petitioners and the suggestion of His Excellency, Sao-Ke Alfred Sze, Chinese Minister to the United States, this Honorable Court granted a writ of certiorari to the Supreme Court of the Philippines on October 19th, 1925.

Upon January 4th, 1926, on the motion of petitioners, concurred in by his Excellency, the Chinese Minister, this cause was advanced and set down for argument on April 12th, 1926.

Statement of Facts.

Petitioners are Chinese nationals legally within United States territory, of age and residents of the City of Manila, where they are engaged in commercial business (R., pp. 145, 146, 175).

Respondent W. Trinidad is the duly appointed, qualified and acting Collector of Internal Revenue of the Philippine Islands, with his office and residence in the City of Manila (R., p. 538).

Respondent Eulogio P. Revilla is the duly appointed, qualified and acting Fiscal or prosecuting attorney

of the City of Manila and a resident of the said city (R., pp. 2, 47).

Respondent the Honorable Pedro Concepcion is one of the duly appointed, qualified and acting judges of the Court of First Instance of the City of Manila, and also a resident of said city (R., pp. 2, 47).

On the 21st day of February, 1921, the Philippine Legislature enacted and approved Act No. 2972 in the following language:

> "No. 2972. AN ACT TO PROVIDE IN WHAT LANGUAGE ACCOUNT BOOKS SHALL BE KEPT, AND TO ESTABLISH PENALTIES FOR ITS VIOLATION.
>
> "*Be it enacted by the Senate and House of Representatives of the Philippines in legislature assembled and by the authority of the same:*
>
> "Section 1. It shall be unlawful for any person, company, partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, in accordance with existing law, to keep its account books in any language other than English, Spanish or any local dialect.
>
> "Section 2. Any person violating the provisions of this Act shall, upon conviction, be punished by a fine of not more than ten thousand pesos, or by imprisonment for not more than two years or both.
>
> "Section 3. This Act shall take effect on November first, Nineteen hundred and twenty-one.
> "Approved, February 21, 1921."
>
> (R., pp. 2, 47).

On March 2nd, 1923, the respondent W. Trinidad, in his capacity as Collector of Internal Revenue, inspected and *seized the account books* of petitioner Yu Cong Eng, which are in the Chinese language, and recommended to the respondent City Fiscal the prosecution of said petitioner for violating Act No. 2972

"by keeping his books of account from January 1, to February 27, 1923, in Chinese and not in English, Spanish or any native dialect as required by law" (R., p. 1019).

As a result of said recommendation the respondent City Fiscal duly filed before the respondent the Honorable Pedro Concepcion, as Judge of the Court of First Instance of the City of Manila, a criminal complaint against the petitioner Yu Cong Eng charging him with the said acts as a "*Violation of the Accounting Law*" (R., p. 13).

A warrant for the arrest of the said petitioner Yu Cong Eng was issued by the said the Honorable Pedro Concepcion and said petitioner was held under bond thereunder (R., pp. 13, 154).

The respondents, the Collector of Internal Revenue, the City Fiscal and the Honorable Pedro Concepcion, intend and threaten to seize the books of petitioner Co Liam and all other Chinese guilty of acts similar to those committed by the said petitioner Yu Cong Eng (R., p. 15).

Operation and Effect of the Law.

Chinese merchants were established in the Philippine Islands before the arrival of the Spaniards in 1520, and the Chinese written language, the only language of importance not permitted by this law to be employed, is an ancient, scientific language employed by the Chinese, Japanese and Koreans, who constitute more than one-fourth of the entire population of the world (R., pp. 1004, 1181).

There are 43 native languages divided into 87 local dialects in the Philippine Islands. One of such local Filipino dialects is employed by as few as 983 persons in the Islands (R., p. 954, Ex. F).

There are approximately 85,000 merchants of all nationalities in the Philippines. Of this number about 71,000 are Filipinos, 1,500 are American, Spanish or British, and of the remaining 12,500 approximately 12,000 are Chinese. These 12,000 Chinese merchants transact more than 60% of the total business done by all the merchants in the Philippine Islands, and they are the principal distributing factors for imported goods and the principal gatherers of goods for exportation, throughout the Islands (R., pp. 1170, 953, 376).

The petitioner Yu Cong Eng is a Chinese merchant engaged in the lumber business at No. 696 Juan Lima, Manila, P. I., and neither reads, writes nor understands the English or Spanish language or any Filipino dialect (R., p. 146).

Yu Cong Eng keeps the books of account of his business in the Chinese language (R., p. 147).

Neither Yu Cong Eng nor his bookkeeper is able to keep his books in any language other than Chinese (R., p. 149).

The employment of a bookkeeper, if sufficient were available familiar with the prescribed languages, would place the books of Yu Cong Eng effectually beyond his control (R., p. 151).

It will be impossible for Yu Cong Eng to operate his business if he is compelled to keep his books in any language other than Chinese, because without first hand knowledge of the contents of his own account books one cannot do business (R., p. 150).

The petitioner Co Liam is a Chinese shop keeper, conducting a small retail merchandise business, commonly known in the Philippines as a Chinese *tienda,* at No. 364, Calle Santo Cristo, Manila (R., p. 175).

Co Liam keeps his books in the Chinese language and neither he nor his employee reads, writes, or understands any language other than Chinese so as to permit

their keeping of books in such other language (R., pp. 176, 177).

Co Liam carries a stock of goods of the value of about P. 6000, and his profits are so small that he cannot afford to employ a bookkeeper familiar with the prescribed languages (R., pp. 176, 177).

If compelled to keep his books in any language other than Chinese Co Liam will be unable to continue the operation of his business (R., p. 176).

Practically all of the Chinese merchants in the Philippine Islands keep but one set of account books and that in the Chinese language (R., p. 1017).

Not to exceed one per cent. (1%) of the Chinese merchants in the Philippine Islands are able to read, write or understand any language other than Chinese sufficiently well to keep their account books or transact business in such other language (R., pp. 417, 492).

The testimony of all of the numerous Chinese merchants examined herein bears out the foregoing statement (R., pp. 168, 207, 228, 260, 283, 298, 314, 325, etc.).

To keep their books of account in any language other than Chinese would necessitate the hiring of foreign bookkeepers by practically all the Chinese merchants, who would even then be entirely dependent upon interpreters for hearsay knowledge of their own business (R., pp. 414, 415, 474, 478, 492).

Approximately 8,500 of the 12,000 Chinese merchants are small retail shopkeepers whose average annual net profits do not exceed P. 500 (R., p. 957).

These Chinese shopkeepers either keep their own books or have Chinese clerks at very low wages to do so (R., p. 381).

The annual wages of Filipino bookkeepers range from P. 900 to P. 6000 (R., pp. 378, 419, 477).

Consequently the great majority of Chinese merchants cannot afford to hire foreign bookkeepers (R., pp. 378, 477).

There are no considerable number of unemployed competent bookkeepers available in the Philippines capable of keeping books of account in English, Spanish or any local dialect, to fill the positions which would be created by the enforcement of the Bookkeeping Act (R., pp. 417, 492, 501).

For the foregoing reasons, if they are compelled to keep their books of account in any language other than Chinese, the great majority of the Chinese merchants in the Philippines cannot continue in business.

The foregoing facts are clearly confirmed by the testimony of Mr. H. B. Pond, Vice-President and General Manager of the Pacific Commercial Company, the largest single importing establishment in the Islands, by the testimony of the Hon. William S. Nolting, ex-Collector of Internal Revenue for the Philippines, ex-Insular Auditor and President and Manager of the Bank of the Philippine Islands, and by that of the late Dr. T. D. Pardo de Tavera, formerly a member of the Philippine Commission and late Chief of the Philippine Library & Museum (R., pp. 379, 420, 422, 440, *et seq.*).

Over one hundred of the most important and largest non-Chinese firms in the Philippines have certified in writing that it is absolutely impracticable for the Chinese merchants to comply with the terms of the Bookkeeping Law and that the enforcement of this law will render it impossible for the great majority of the Chinese merchants to continue in business (R., p. 16).

The same conclusion has been expressed in writing by the American Chamber of Commerce of China, by the American Chamber of Commerce at Tientsin, China, by the Seattle, Portland and San Francisco Chambers of Commerce and by the Merchants' Association of New York (R., pp. 23-29).

Purpose of and Necessity for the Law.

The Accounting or Bookkeeping Law is a general penal law, concerning which the respondent Collector of Internal Revenue has testified as follows:

> "* * * we are dealing with the Chinese Accounting Law, which is a general law. It does not belong to the Bureau of Internal Revenue" (R., p. 608).

The legislative debates upon the law evidence clearly that the books intended to be covered thereby are *all* the account books of merchants (R., pp. 972, *et seq.*).

The Bureau of Internal Revenue considers itself interested in *some* only of the books covered by the provisions of this law (R., pp. 993, 1098).

The Philippine Supreme Court acknowledges that the law was immediately and popularly known as the "Chinese Bookkeeping Law" (R., p. 1155).

The Bureau of Internal Revenue admits that the only possible benefit to it to be derived from the enforcement of the law is "to facilitate the inspection" of taxpayers' books (R., p. 938).

No other governmental department seems to have claimed any benefit to be derived from the enforcement of the law.

The 12,000 Chinese merchants in the Philippine Islands now pay and for many years last past have been paying more than 60% of the taxes levied on the total mercantile transactions of the Islands (Ex. C, R., pp. 953, 1184).

The Chinese merchants compare very favorably as to integrity and general commercial honor with those of other nations doing business in the Philippine Islands (R., pp. 379, 425).

The Bureau of Internal Revenue has never experienced and does not now experience any difficulty in

finding and employing enough competent and honest Chinese accountants to make the necessary inspections of Chinese books (R., pp. 150, 423, 424, 499).

In fact, the respondent Collector of Internal Revenue in his recommendation for the prosecution of the petitioner Yu Cong Eng, offered the prosecuting authorities the services of one of the Bureau's Chinese accountants (R., p. 1019).

Examiners of the Bureau of Internal Revenue have regularly inspected the books of the Chinese merchants in the Chinese language (R., pp. 218, 221, 229, 236, 244, etc.).

In every instance in which the Bureau of Internal Revenue suspects under-declarations by Chinese merchants, it is able to and does cause the books of such merchants to be inspected by Chinese accountants (R., p. 941).

The Chinese as well as the other merchants of the Philippine Islands were at the time of the passage of this law, and they now are, properly filling out in arabic numbers all the forms prescribed and printed in English and Spanish by the Bureau of Internal Revenue as a basis for the assessment of taxes (R., pp. 931, 933, 934).

In the opinion of the Hon. William T. Nolting, rendered in the course of his testimony herein, the enforcement of this law will be prejudicial not only to the Chinese merchants but to the Philippine Government as well (R., pp. 421, *et seq.*).

The ostensible purpose of and necessity for the enactment of this Accounting or Bookkeeping Law is thus formally stated by the Hon. Vicente Urgello, the representative who introduced the original bill in the Philippine legislature:

> "Not all the merchants established in the Philippine Islands being of the same nationality, *some of them are keeping their account books in*

> *their native language. This renders the examination of these books by government agents somewhat difficult,* as in many cases the co-operation of a translator is required, which is a burden for the public exchequer.
>
> Uniformity and facility of examination and revision of these books require that the same be kept in English or Spanish by the merchants, whether individuals or corporations.
>
> This is the purpose of the bill herewith" (R., p. 967).

The Committee in charge of the bill, being convinced that *certain* merchants would not be able to comply with the law for the reason among others that they would not be able to obtain bookkeepers, proposed an amendment to the bill giving the Secretary of Finance power to

> "* * * make such exceptions as he may consider necessary in favor of persons for whom, in his judgment and upon examination and investigation, it may be *impossible to comply with the provisions of this act*" (R., pp. 968, 972).

The Philippine legislature rejected this proposed amendment with knowledge that its movers intended it to "give equal protection and opportunity to all" and particularly to the Chinese (R., pp. 977, 974).

Subsequently, in the great agitation created by the passage of the law, the Philippine Executive Department recommended either a substitute law or a practically indefinite postponement of the effective date of this law because of its non-enforceability. All such suggestions were rejected by the Legislature (R., pp. 990-998, 1058-1117).

During the course of the debates upon such recommendations it appears that the Philippine Bureau of Internal Revenue had admitted that

> "* * * in Mindanao and other distant parts of the Archipelago, the Chinese, though they be willing, cannot find competent men to keep their books of account in English, Spanish or a local dialect" (R., p. 996).

One of the most ardent proponents of this law, Sr. Gallares, upon being questioned in the course of the debates as to the possible detrimental effect upon the Philippines involved in driving the Chinese merchants out of business by the enforcement of this law, said:

> "On the contrary, our trade would be stimulated by the disappearance of a powerful rival * * * because the Filipinos would go into business and take the place of the Chinese * * *" (R., p. 986).

The Seattle and Portland Chambers of Commerce in their protest against this law characterize it directly as

> "* * * an arbitrary and unfriendly act toward a friendly nation" (R., p. 26).

A similar opinion is expressed by the New York Merchants' Association (R., p. 29).

The necessarily disastrous effect of the enforcement of this law upon the Chinese merchants of the Philippine Islands is recognized in the protests against the legislation voiced by the Chinese and non-Chinese business community, and the various Chambers of Commerce (R., pp. 16, 23-29).

The enactment of this law has called forth additional vigorous protests from the Chinese Foreign Office (R., p. 999), from the Bureau of Insular Affairs of the War Department (R., p. 1000), from the Committee on the Judiciary and the Committee on Insular Affairs of the American House of Representatives, as well as from a further one hundred members of that body (R., pp. 1002-1012).

The Bureau of Insular Affairs of the War Department, speaking on behalf of that Department in its letter to the Governor General, characterizes the law as follows:

> "*We are of the opinion here that the law is fundamentally unwise.* The object of it is apparrent, and any reasonable measures to prevent frauds on the revenue collections are not open to criticism. It is felt, however, that *frauds may be committed in any language, and while keeping books in Chinese, or other foreign languages, is an inconvenience to the tax collector, this inconvenience is greatly overbalanced by that of the merchant having his books kept in a language which he does not understand. A reciprocal provision in China would meet our serious protest*" (R., p. 1000).

Brief of the Argument for the Petitioners.

It would seem that a mere statement of the facts should suffice to demonstrate the confiscatory, arbitrary and unequal nature of this legislation, aimed as it is directly at the lives and property of the Chinese merchants of the Philippines, and having no reasonable relation whatever, even colorable, to any object within the competency of the Philippine Legislature to accomplish.

In any event, a brief analytical consideration of the law and its purpose and effect, in accordance with constitutional principles, must establish its invalidity as written, and the clear impossibility of correcting it, as the Philippine Supreme Court has sought to do, by judicial legislation.

The guaranties of the fundamental personal rights declared in the Federal Constitution are applicable in the Philippines, not only inherently but specifically by the direct extension thereof to those islands by the provisions of the Philippine Autonomy Act.

This Chinese Bookkeeping or Accounting Law by its natural and intended operation and effect deprives an important class of the Philippine community of the right to employ its own language in private business or commerce.

To thus restrict the means of doing all business is to effectually destroy the power to do any business.

No alleged public necessity has ever been found sufficient to justify the destruction of all right and power in an important class of individuals to engage in business generally. Such prohibition is upon its face so burdensome upon the Chinese as to be utterly confiscatory, and without regard to the purpose sought to be served thereby, could not be sustained. Moreover, when the alleged purpose, as here, is found to be trifling and specious, the enforcement of such a law constitutes the clearest deprivation of liberty and property without due process of law.

Furthermore, when it is apparent that the Chinese alone of the 85,000 merchants in the Philippines are denied the use of their own language by this Act, which permits to all others what it denies to them, without any reasonable justification or necessity for the classification, the invalidity of the legislation as a denial of the equal protection of the laws becomes clear.

No paramount social necessity for any restriction upon the right of the Chinese to use their native tongue in business in the Philippines is shown to exist, and no such necessity can be shown for singling out for prohibition the Chinese language, an ancient, scientific, and widely known written language, when local Filipino dialects, unscientific and known by as few as a thousand souls, are permitted to be employed.

The purpose of the classification is obvious. It is a blow aimed directly at the economic lives of the Chinese merchants of the Philippines, arbitrary and

unjust and without substantial pretence of necessity or reason to support it.

The "most favored nation" clauses of the treaties with China also condemn this law, permitting as it does to the British and Spanish residents of the Philippines what it denies to the Chinese alone.

The majority of the Philippine Supreme Court, in their anxiety to uphold the legislature, have attempted a construction of the legislation which is entirely fanciful and wholly at variance with the plain terms and import of the Act. In doing so they have only succeeded in adding greater indefiniteness to the already fatal constitutional objections to the law.

Our more detailed argument upon the questions involved herein will be considered under the following points:

I.—Act No. 2972 is void as contrary to the prohibitions of the Philippine Bill of Rights and the Fifth Amendment to the Federal Constitution.

II.—The Act is also void because it denies to petitioners and others similarly situated the rights, privileges and immunities secured to them by the treaties between the United States and China which assure to Chinese nationals "most favored nation" treatment.

III.—This Court may determine the validity of the Act untrammeled by the construction thereof adopted by the Philippine Supreme Court. That construction is clearly erroneous and wholly at variance with the plain import and language of the Act.

ARGUMENT.

I.

Act No. 2972 is void as contrary to the prohibitions of the Philippine Bill of Rights and the Fifth Amendment to the Federal Constitution.

It has long been clear, quite apart from the direct extension of those fundamental guaranties to the Philippine Islands by the provisions of the Philippine Bill of Rights, that the prohibitions embodied in the Fifth Amendment to the Federal Constitution against the deprivation of liberty and property without due process of law and against the denial of the equal protection of the laws, are fully operative in the Philippine Islands. *Balzac* v. *Porto Rico*, 258 U. S. 298, 312.

The Philippine Bill of Rights itself, in the precise language of the Fifth and Fourteenth Amendments, provides:

> "That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." (Sec. 3 of the Philippine Autonomy Act, 39 Stat. L. 545, 1918 Supp. Fed. Stat., Ann. p. 593.)

The application and construction of this fundamental law is thus explained in *Serra* v. *Mortiga*, 204 U. S. 470 at 474:

> "It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands, 32 Stat. 691, 692, that guarantees equivalent to the due process and equal protection of the law clause of the Fourteenth Amendment, the twice in jeopardy clause of the Fifth Amendment, and

> the substantial guarantees of the Sixth Amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. *Kepner* v. *United States,* 195 U. S. 100.
>
> For the purpose, therefore, of passing on the errors assigned we must test the correctness of the action of the court below by substantially the same criteria which we would apply to a case arising in the United States and controlled by the bill of rights expressed in the amendments to the Constitution of the United States."

We must be guided, consequently, in testing the constitutionality of Philippine legislation, by exactly the same considerations, applicable in favor of citizen and alien alike, which have moved our courts in their decisions involving Federal and State legislation under the Fifth and Fourteenth Amendments respectively to the Federal Constitution.

> *Tonawanda* v. *Lyon,* 181 U. S. 389, 391;
> *Kepner* v. *U. S.,* 195 U. S. 100, 124;
> *Yick Wo* v. *Hopkins,* 118 U. S. 356.

This Court has but recently held, *Meyer* v. *Nebraska, infra,* that the right to the free use of language is within the protection of the Constitution.

It cannot be questioned, therefore, that the prohibition against the use of one's native tongue in the conduct of one's business and the keeping of one's books of account therein, constitutes some restraint upon a natural personal and property right, which, to be sustainable, must find justification in the principles establishing the constitutional relations between the government and the governed.

No better statement of the indispensable criteria of constitutionality in cases involving the abridgment of personal and property rights, may be found than that repeated and readopted by this Court in its decision in *Dobbins* v. *Los Angeles,* 195 U. S. 223, at 236:

> "In *Lawton* v. *Steele,* 152 U. S. 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:
>
> > 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'
>
> "And, again, in *Holden* v. *Hardy,* 169 U. S. 366, 398, the same justice, again speaking for the court, said:
>
> > 'The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class'."

We must seek, consequently, first, the operation and effect of the Chinese Bookkeeping Law, then its purpose, and finally, the relationship between such purpose and effect. In so doing we must inevitably find that the law, upon its face and by its natural operation and

effect, deprives petitioners and the other Chinese similarly situated, of their liberty and property without due process of law and denies to them the equal protection of the laws.

From the overwhelming evidence in the case it must be accepted as entirely clear that unless the 12,000 Chinese merchants in the Philippine Islands are permitted to keep their books of account in their native language, the result will be the destruction of all but the largest of them.

The vast majority of these Chinese merchants know no language other than their own and cannot keep their account books in any language other than Chinese. The necessary bookkeepers are not available to keep the books of these Chinese merchants in any language other than Chinese, and even though such bookkeepers were available, the cost to the Chinese merchants of hiring them would, in most cases, exceed the total annual profits of such merchants. Finally, the Chinese merchants would not be able to understand their own books if they were kept in any other language.

This law as written will, even if physically enforceable, place the Chinese merchants' books entirely beyond their power and comprehension. It requires no argument to demonstrate that such a state of affairs must inevitably drive the Chinaman out of business, for, as the petitioner Yu Cong Eng has naïvely said:

> "for a merchant the books of account are the eyes of his business, and without the eyes, he cannot do business" (R., p. 150).

What possible justification can be offered for legislation leading directly to such an end?

The very briefest examination of the facts herein will disclose the trifling apology of social purpose and necessity here submitted to thinly mask the object of the law which is to be clearly found in its logical effect.

No government department other than the Bureau of Internal Revenue offers the slightest excuse for this general penal law, and that department can only suggest that the law will "*facilitate the inspection*" of taxpayers' books which are "*somewhat difficult*" to examine in the Chinese language!

Where is there shown the slightest real necessity for thus destroying these Chinese merchants?

The Chinese merchants have always made the necessary returns to the taxing authorities of the Philippines.

The Bureau of Internal Revenue can obtain sufficient competent and honest Chinese accountants, if it will, to examine the books of all the Chinese merchants, and it has always been able to inspect Chinese books and to uncover any under-statements therein.

In this situation what purpose can the law serve except possibly to save a few dollars in administrative expenses to the Bureau of Internal Revenue?

Such an object cannot possibly constitute sufficient basis in reason or necessity for legislation so highly penal and destructive!

What reason exists for a classification proscribing the Chinese language, when local dialects, employed by as few as 983 persons, are permitted? Can books in dialects so little known be more readily examined?

There can be little doubt as to the true object of this law, in the light of the legislative debates at the time of its passage and its peculiar and destructive effect upon the Chinese merchants alone, the "powerful rivals" who do most of the mercantile business of the Philippines, and without whom, as all but the very short-sighted know, the whole economic life of the Islands must be seriously impaired.

This law is a general penal law, aimed directly at the Chinese, and convenience to the taxing authorities, if in fact there be any, is but an afterthought conjured up to disguise its true nature.

A test of this law by the standards set by this and other Courts, leaves little room for debate as to its invalidity.

The Supreme Court of the Hawaiian Islands had occasion to consider a law almost identical in language and alleged purpose in *The King* v. *Lau Kiu*, 7 Haw. Rep. 489.

The legislation before that Court provided that:

> "No wholesale or retail license shall be granted to any person except upon the express condition that such licensee shall at all times keep full, true and correct books of account of all business transacted by him in connection with such licensed business, *which books of account shall be kept in the English, Hawaiian or some European language.*"

Defendant, a Chinaman, was convicted of a violation of the statute.

The Hawaiian Court, in declaring the Act invalid, condemned it in the strongest terms:

> "This legislation is an attempt to impose a restriction and a burden upon the exercise of a lawful employment which borders upon tyranny" (p. 494).

And in considering the clause requiring account books to be kept in certain languages, that Court said:

> "The Legislature cannot, without infringing upon liberty and the rights of property, thus discriminate. *The argument that the Chinese language, which is evidently the one that is sought to be proscribed by this Act, is occult and understood by few other than the Chinese themselves, is of no force, for there are European languages that are as little understood in this Kingdom as Chinese, and yet the books of account are by this Act allowed to be kept in them*" (p. 496).

The Hawaiian Act purported upon its face to be in advancement of the public welfare by preventing frauds. The only purpose, spelled out of the Philippine Act with great difficulty, and after the fact, is slight governmental convenience, which cannot under any circumstances be treated as a matter of public interest or general welfare.

In *Meyer* v. *Nebraska*, 262 U. S. 390, this Court, considering a similar attempted limitation upon the use of foreign languages, refused to sustain legislation making it unlawful to teach foreign languages to children. The statute was held to be an invasion of the liberty of foreign language teachers to pursue their occupation as well as that of parents to direct the education of their children.

If States may not exercise the police power to bar the use of foreign languages in schools, *a fortiori*, it is not permissible under the merest color of a revenue law to prohibit employment of a foreign tongue in purely private business.

Concisely and authoritatively are the principles enunciated by Mr. Justice McReynolds, speaking for the Court, in the *Meyer* case:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. 'No state shall * * * deprive any person of life, liberty, or property, without due process of law.'
>
> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but *also the right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dic-

> tates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. * * * *The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.* Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 137." (p. 399).
>
> "We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state" (p. 403).

It is submitted that the Act in the instant case is far less justifiable than that considered in the *Meyer* case. The former by its express terms and natural operation will drive an entire class of the community from the field of private commerce,—a field in which the police power must surely be exercised with greater circumspection than in that of education. This is the sort of prohibitory legislation which is the least justifiable under any power, as it is

> "* * * discrimination * * * imposed upon the conduct of ordinary private enterprise covering the entire field of industry * * *."
>
> *Terrace* v. *Thompson*, 263 U. S. 197, 221.

In determining the invalidity of the Oregon School Law, this Court speaking by Mr. Justice McReynolds, found that,

> "The inevitable practical result of enforcing the Act under consideration would be destruction of appellee's primary schools, and perhaps all

other private primary schools for normal children within the State of Oregon."

Pierce v. *Society of Sisters*, 268 U. S. 510, 534.

The Act here in question effectually denies to the overwhelming majority of Chinese merchants in the Philippine Islands the right to engage in private business and, therefore, of earning a livelihood. A necessary incident of the right to engage in any commercial occupation is the keeping of books of account. Without proper account books no business of any size can go on. This law, moreover, deprives the professional Chinese bookkeepers, employed by the larger Chinese merchants, of their means of livelihood, and is an interference with a lawful occupation no less objectionable than the destruction of the occupation of foreign language teachers. Only the most extraordinary considerations of public welfare should be offered to justify so violent an invasion of individual liberty, yet no real purpose of social importance or necessity is here submitted.

In *Truax* v. *Raich*, 239 U. S. 33, and in *Adams* v. *Tanner*, 244 U. S. 590, this Court frustrated legislative attempts to arbitrarily interfere with the pursuit of lawful occupations.

The former involved consideration of an Arizona penal statute in the following language:

> "Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some subdivision thereof" (p. 35).

Plaintiff Raich was neither a qualified elector nor native born. He was employed as a cook by defendant

Truax who had in his employ at the time nine workers. Truax informed plaintiff that solely by reason of the requirements of the law he intended to discharge him. Plaintiff thereupon filed a bill in the District Court seeking a decree declaring the law unconstitutional under the Fourteenth Amendment and restraining enforcement thereof.

An interlocutory injunction was granted below and on appeal sustained by this Court.

This Court, by Mr. Justice Hughes, declared,

> "*The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law*" (p. 38).

And at page 41:

> "It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. *But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins, supra; Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no

> answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens —is vested solely in the Federal Government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713. *The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.* And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."

The Philippine Act quite as effectually deprives the Chinese of "the means of earning a livelihood."

The Arizona statute represented an avowed attempt to discriminate against alien labor. Its purpose was frankly revealed in its title. The purpose of the Philippine Legislature was quite as clear but not as frankly stated.

In *Adams* v. *Tanner, supra*, this Court was called upon to determine the validity of a Washington law declaring it

> "unlawful for any employment agent, his representative, or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto" (p. 591).

Appellants, employment agents, filed a bill to have respondents restrained from undertaking enforcement thereof. The bill was dismissed, and upon appeal to this Court, the judgment below was reversed.

Here again a legislature had attempted under the guise of police regulation to invade the ever-narrowing province reserved to individual liberty under the Fourteenth Amendment. This Court, however, through Mr. Justice McReynolds, recognizing that the statute by its natural operation was "one of prohibition, not regulation" (p. 593), held

> "The bill alleges 'that the employment business consists in securing places for persons desiring to work' and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. *We think this conclusion is obviously true.*" (p. 592.)

And at page 594:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. *Skillfully directed agitation might also*

bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

The dissent in that case was based upon the existence of a paramount social necessity, a factor conspicuously absent in the present case.

It may be here said with even greater truth than in the *Adams* case, that unless the Chinese merchants are permitted to use their native tongue in keeping their books of account, "their business cannot succeed and must be abandoned." Against an invasion of liberty inevitably conducive to so disastrous a result, it surely cannot be sufficient to set up the mere convenience of the government in collecting taxes.

Fundamental rights are not to be disregarded, even for the convenience of revenue officials.

Southwestern Oil Co. v. *Texas*, 217 U. S. 114.

Moreover, it is not proved here that governmental convenience will be materially promoted by the legislation in question.

In *Coppage* v. *Kansas*, 236 U. S. 1, this Court again halted an attempted restriction upon the liberty of pursuing legitimate callings.

Appellant was sentenced to pay a fine with the alternative of imprisonment for violation of an act declaring it unlawful

> "for any individual or member of any firm or any agent, officer or employee of any company or corporation, to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such per-

> son or persons securing employment, or continuing in the employment of such individual, firm, or corporation" (p. 6).

Appellant, superintendent of a railroad company, had requested a switchman to sign an agreement to withdraw from a labor union, and at the same time informing him that if he did not sign he could not remain in the employ of the company. The switchman refused to sign and was discharged.

The Court upon these facts reversed the judgment of conviction on the ground that the Act was not a proper exercise of the police power.

> "The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare', and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment" (p. 19).

Burns Baking Co. v. *Bryan*, 264 U. S. 504, is a recent application of the principle that

> "determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." (*Meyer* v. *Nebraska*, *supra*, p. 400.)

In the *Burns* case a Nebraska law prescribed the minimum and maximum weights of loaves of bread to be made or offered for sale in the State. The evidence demonstrated that it was impossible to manufacture good bread in the regular way without frequently exceeding the prescribed maximum weights.

In holding the statute void as imposing restrictions essentially unreasonable and arbitrary in that the provision fixing maximum weights is not calculated to

effect the purpose of protecting purchasers from fraud, the Court declared:

p. 513:

> "But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. * * * Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted."

Other cases wherein the courts have refused to sustain similarly objectionable state statutes are:

Penn. Coal Co. v. *Mahon,* 260 U. S. 393.
Truax v. *Corrigan,* 257 U. S. 312.
Buchanan v. *Warley,* 245 U. S. 60.
Home Tel. & Tel. Co. v. *City of Los Angeles,* 227 U. S. 278.
In re Lee Sing, 43 Fed. 359.
In re Jacobs, 98 N. Y. 98.

Even though the Philippine Act did not, as it obviously does, discriminate directly against the Chinese, nevertheless "the purpose of an act must be found in its natural operation and effect." (*Truax* v. *Raich, supra,* at p. 40). In *Yick Wo* v. *Hopkins,* 118 U. S. 356, this Court pierced the veil of ordinances couched in the most general terms and not expressly discriminatory, and ascertained that the ordinances were in their administration

> "*directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by*

> *the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States"* (p. 373).

This Court in the *Coppage* case, *supra,* at p. 15, affirmed its duty to examine *de novo* questions under the Constitution regardless of form or state court construction.

> *"But, when a party appeals to this Court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the State law, nor even upon its declared purpose but rather upon its operation and effect as applied and enforced by the State; and upon these matters this Court cannot, in the proper performance of its duty, yield its judgment to that of the State Court."*

The Court in this as in other cases examined all the facts and circumstances surrounding the controverted legislation to determine if it had any reasonable relation to the public health, safety, morals or general welfare. If there be no such relation, as there is not in the instant case, then the legislation is not a proper or reasonable exercise of the police power.

In *Mugler* v. *Kansas,* 123 U. S. 623, 661, Harlan, *J.,* said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted

> to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Other decisions where this Court has looked back of the form of statutes to find illegal classifications are:

> *Henderson* v. *Mayor,* 92 U. S. 259.
> *Bailey* v. *Alabama,* 219 U. S. 219.
> *Guinn* v. *U. S.,* 238 U. S. 347.
> *Penn. Coal Co.* v. *Mahon, supra.*

Surely the Philippine statute, whether or not impartial on its face, must by its natural operation make "unjust and illegal discrimination between persons in similar circumstances, material to their rights * * *." This result seems inevitable when one considers that of the 85,000 merchants in the Philippines, only the Chinese will be affected by operation of the law. In its administration the public authorities cannot but apply it "exclusively against a particular class of persons."

In *Penn. Coal Co.* v. *Mahon, supra,* this Court held void a statute prohibiting mining where there was danger of causing the subsidence of human habitations, in a case where the operation of the statute would impair contract rights.

In *Buchanan* v. *Warley, supra,* this Court held void a city ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses were occupied by whites, and *vice versa.*

In *Guinn & Beal* v. *U. S., supra,* this Court declared the unconstitutionality of the so-called Grandfather Clause of the Oklahoma Constitution. This case is another application of the doctrine that the court will not

be concluded by the mere form of a state statute or constitution but will consider its necessary operation and effect in determining its validity under the Federal Constitution.

Bailey v. *Alabama, supra,* stands also for the proposition that the court will go back of the form and express language of a statute. There a statute was held void which provided that where an employee having been advanced wages quit before the end of the term without just cause, he was *prima facie* guilty of intent to defraud.

> "Without imputing any actual motive to oppress we must consider the natural operation of the statute here in question * * *" (p. 244).

In re Sing, supra, involved an ordinance of the City of San Francisco which required all Chinese inhabitants to remove from a specified area to another specified area within the city. The Circuit Court for the Northern District of California held the ordinance void as discriminating and unequal in its operation, and as an arbitrary confiscation of property without due process of law.

In *Quong Wing* v. *Kirkendall,* 223 U. S. 59, the Court considered a Montana statute requiring payment of a license fee by all persons engaged in the laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. In upholding the classification, however, Mr. Justice Holmes speaking for the Court remarked at p. 63:

> "*Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; which would be a discrimination that the Constitution does not allow. Yick Wo* v. *Hopkins,* 118 U. S. 356. It is a matter of common observation that hand laundry work is

> a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged and rather was disclaimed when it was mentioned from the Bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. * * * Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

The designation of Act No. 2972 as the *Chinese* Accounting or Bookkeeping Law, adopted quite naturally and unconsciously by the Collector of Internal Revenue, the Philippine Supreme Court, and the world at large, demonstrates conclusively the discriminatory object and effect of the law.

It is clear beyond cavil that the Act is aimed at the Chinese and is, therefore, "a discrimination that the Constitution and Act of Congress do not allow." It is established beyond peradventure of doubt that the burden of the statute will fall exclusively upon the Chinese.

This natural effect, embodying as it does the only real purpose of the law, was immediately recognized and condemned by all classes of the Philippine and American community, and we are, therefore, led to inquire of this law as Mr. Chief Justice Taft did of the law in the *Child Labor Tax Case*, 259 U. S. 20, at 37,

> "Its * * * effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

All can readily see and understand that this Chinese Bookkeeping Law bears no relation whatever to any

legitimate and paramount social necessity, but that its object, the destruction of the Chinese merchants of the Philippines, is entirely beyond the competency of the governing power of those Islands, being directed against the very rights which it is the function of our Constitution and the Philippine Bill of Rights to preserve.

Any restraint upon the right to exercise any lawful calling must be justified, if at all, by some paramount social necessity to which the restraint bears some reasonable relation. The destruction, however, of all right in an important class of the community to earn a livlihood has never been and cannot be sustained.

II.

The Act is also void because it denies to petitioners and others similarly situated the rights, privileges and immunities secured to them by the treaties between the United States and China, which assure to Chinese nationals "most favored nation" treatment.

> "The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. *By the third article of the treaty between this government and that of China, concluded November* 17, 1880, 22 *Stat.* 827, *it is stipulated*: '*If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers, to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.*"

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; *and the equal protection of the laws is a pledge of the protection of equal laws*" (Matthews, *J.*, in *Yick Wo* v. *Hopkins*, *supra*, p. 369).

The "*prevention of invidious discriminations*" regarding persons and property, which operate against the Chinese and not against the citizens and subjects of more favored nations, must certainly be within the protection afforded by a treaty provision of so fundamental a purpose. *Fulco* v. *Schuylkill Stone Co.*, 169 Fed. 98, 100.

British and Spanish residents of the Philippines are permitted by this law to keep their books of account in their native language.

In view of the Treaties, how can this discrimination against the Chinese be justified?

III.

This Court may determine the validity of the Act untrammeled by the construction thereof adopted by the Philippine Supreme Court. That construction is clearly erroneous and wholly at variance with the plain import and language of the Act.

This Court is authorized to review the decision of the Supreme Court of the Philippine Islands, and may entirely disregard the construction placed upon the Act by that Court.

Mr. Justice Brandeis, delivering the opinion of the Court in *Philippine Sugar, etc. Co.* v. *Philippine Islands*, 247 U. S. 385, 390, declared:

> "This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578. *But that disposition may not be yielded to, where the lower court has clearly erred. Carrington* v. *U. S.*, 208 U. S. 1. Here, the construction adopted was rested upon a clearly erroneous assumption as to an established rule of equity. The Supreme Court erred in refusing to consider the evidence of mutual mistake; and its judgment must be reversed."

In *Yick Wo* v. *Hopkins*, *supra*, at p. 366, the court declared that it was —

> "constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question."

In *Scott* v. *McNeal*, 154 U. S. 34, at 45, its power and duty are clearly stated by this Court:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, *this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is* whether the Statute provided for the notice required to constitute due process of law, than when the question is whether the statute create a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the court of another State. *In every such case, this court must decide for itself the true construction of the*

statute. Huntington v. *Attrill*, 146 U. S. 657, 683, 684; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492-495."

The majority opinion of the Philippine Supreme Court conceded that if the plain language of the Act meant what it said, then it would probably be unconstitutional:—

> "*A literal application of the law would make it unlawful for any Chinese merchant to keep his account books in any language other than English, Spanish or a local dialect. The petitioners say the law is susceptible of that interpretation. But such interpretation might, and probably would, cause us to hold the law unconstitutional*" (R., p. 1197).

But in order to save the Act—and the face of the legislature—the court struggled to devise a construction that would bring the Act within the pale. In pursuit of this purpose, the court was able to conjure up an occult constitutional legislative intent, very different from the plain language of the sweeping prohibition set forth in the Act.

> "Act No. 2972 is a fiscal measure. It should be so construed if possible as to effectuate legislative intent, as collected from the occasion for the law, the circumstances, under which it was enacted, the mischief to be remedied, and the policy which dictated its passage. *It should be so construed if possible as to avoid conflict with the Constitution, although such construction may not be the most obvious or natural one.* Giving, therefore, to the law a meaning which will carry out the main governmental purpose and which will permit us to sanction its constitutionality, it seeks to prohibit not only the Chinese but all merchants of whatever nationality from making entries in books of account or forms subject to inspection for taxation purposes in any other

> language than either English, Spanish or a local dialect, although permitting all merchants to execute their commercial transactions or operations in any language or dialect they may prefer, and although permitting them to keep such other books of account as their personal convenience may dictate and in a language which will come most easily to them * * *" (R., p. 1199).
>
> * * * * * *
>
> "We construe Act No. 2972 as meaning that any person, company, partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, *shall keep its account books, consisting of sales books and other records and returns required for taxation purposes by regulations of the Bureau of Internal Revenue, in effect when this action was begun*, in English, Spanish or a local dialect" (R., p. 1201).

That the law was not intended as a *fiscal* measure is clearly recognized by the Collector of Internal Revenue himself who has testified herein:—

> "* * * we are dealing with the Chinese Accounting Law, which is a general law. *It does not belong to the Bureau of Internal Revenue.*"

Thus, in straining after a constitutional construction of a palpably invalid law, the court enacted a new law.

We are, of course, aware of the salutary rule that where it is fairly possible to do so without doing violence to the terms thereof, the courts should so construe a statute as to be able to uphold it.

> *United States* v. *Jin Fuey Moy*, 241 U. S. 401.
> *The Abby Dodge*, 223 U. S. 166.
> *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87.

This rule does not, however,

> "intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."
>
> *Hill* v. *Wallace*, 259 U. S. 44, 70.

This Act is couched in the simplest and most direct terms conceivable to state its purpose that no account books shall be kept in other than the prescribed languages.

The legislative debates upon this law demonstrate clearly that the keeping of *all* account books was intended to be prohibited, although the law itself fails entirely to define "books of account."

As was said by this Court in *St. Louis & Iron Mountain Ry. Co.* v. *Taylor*, 210 U. S. 281, 294:

> *"We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described.* It is enacted that 'no cars either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' *There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance."*

The limitation attempted to be injected into this law by the Philippine Supreme Court, restricting its operation to indefinite and unnamed books for "taxation" purposes, so clearly violates the intention of the "few simple words" of the Act as to require little comment.

If tax books and returns were all that were contemplated by this law the legislature must be deemed to have indulged in a meaningless act of surplusage, for it is conceded that the Chinese as well as all of the Philippine merchants have been at all times submitting

the required tax forms and blanks in the prescribed languages.

Furthermore, would it not have been the simplest matter for the Philippine legislature, had it intended to so limit its prohibition, which it obviously did not, to express the limitation in adequate language?

> *United States* v. *First National Bank*, 234 U. S., 245, 248.

It is clear beyond shadow of doubt, from the title and the simple terms of this Act, that no account books, not even a duplicate set, may be kept in the Chinese language.

It would be difficult to find a more perfect illustration of "spurious interpretation" than that here employed by the Philippine Court.

> "The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed."
>
> * * * * *
>
> "On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery."
>
> SPURIOUS INTERPRETATION, by *Roscoe Pound*, 7 Col. Law Rev. 379, 381, 382.

Even though this Act could in any manner be reconstructed, from a plain prohibition against the keeping of any account books in other than the prescribed languages, into the new Act created by the Philippine Supreme Court, prescribing a limited number of un-

ascertained books to be kept in certain languages, such judicial legislation could not save it.

The Philippine Supreme Court in its opinion recognizes that

> "It has not escaped our notice that the law does not specify what books shall be kept" (R., p. 1198).

We search in vain to find in the Act any requirement that any account books of any sort be kept. The Act is silent on that point. Nor do we find in the legislation of the Philippine Supreme Court any sufficiently definite provision as to what books shall be kept. The inevitable result must be chaos.

How is the infortunate merchant to know which of his books of account, either under the law as written or under the lower court's construction thereof, are to be kept in the designated languages, and which may be kept in the language which he can read and understand?

Certainly a penal law must be definite if nothing else.

In *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 238, this necessity is thus stated:

> "Section 4 provided it should be 'unlawful for any person wilfully * * * to make any unjust or unreasonable * * * charge in * * * dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries.' In a series of cases, of which *United States* v. *Cohen Grocery Company*, 255 U. S. 81, and *Weeds, Inc.* v. *United States*, 255 U. S. 109, are examples, this court held that provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, *because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was.*"

The Philippine Supreme Court, having clearly recognized the total indefiniteness of the law in its failure to

define "books of account," should, under its plain duty, have held the law unconstitutional for that reason. In its attempt to evade this necessity that Court was entirely unsuccessful, because the same fatal objection exists against the new law which the Court attempted to enact.

The admirable opinions of Justices Street and Johns of the Philippine Supreme Court, in their vigorous dissent herein, so thoroughly demonstrate the unconstitutionality of this Act that they could very well serve, without more, as the brief on behalf of petitioners herein. The impossible situation created by the construction of the law adopted by the majority of the Philippine Court, is thus stated by Mr. Justice Johns:—

> "The majority opinion holds that the law should be construed to read that account books, for taxation purposes only, shall be kept in either English, Spanish or any local dialect. With all due respect to the majority opinion, *that is the very highest type of judicial legislation.* If the act is to be so construed, then the law itself should specify and define what books are required to be kept for taxation purposes, and how they should be kept, or it should delegate that power to the tax officials.
>
> Assuming, as the majority opinion does, that Act 2972 should read that account books, for taxation purposes, should be kept in either English, Spanish or any local dialect, *the act does not specify or define what books shall be kept or how and in what manner they shall be kept.* Neither does it delegate that power to anyone else. *In its effort in trying to get out of one hole and make a void law a valid law, the majority opinion runs into another hole, which is equally fatal to the law"* (R., p. 1214).

Finally, even if this legislation is not unconstitutional as written, for failing adequately to express its subject in its title, as required by Sec. 3 of the Philippine Au-

tonomy Act, it is assuredly rendered so by the Court's imposition upon the law of an assumed "revenue" purpose clearly not embodied in its title.

The lower court's construction creates the situation contemplated by this Court in the *Employers Liability Cases*, 207 U. S. 463, at 500, wherein it said:

> "To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

There can be no doubt that the decision of the Philippine Supreme Court is the boldest sort of judicial legislation and is legally unjustifiable, however much we may sympathise with its struggle to avoid the horns of the dilemma by attempting to placate both legislature and victims. It has the added vice of rendering the law even more fatally indefinite.

It is interesting to note the attitude of the Philippine Court when confronted by a regulation of the Collector of Internal Revenue identical in substance with the Act as reconstructed in this case. In *Young* v. *Rafferty*, 33 Phil. Reports 556, decided prior to enactment of Act No. 2972, the Supreme Court of the Philippines had before it a regulation of the Collector requiring all merchants to keep a daily sales book in English or Spanish. It was held that in thus prescribing certain languages the Collector had exceeded his authority to make necessary regulations not inconsistent with law, to carry out the Revenue Act. In reaching this conclusion, the Court stated at p. 559:

> "We apprehend that no one will deny that sales could be recorded in a bound volume such as is specified using the tabulated form desired

> by the Collector, in any modern language. In other words all the information could be recorded in the designated book in the required form in Chinese or in a local dialect or in some other language as accurately as it could be recorded in English or Spanish."

Again at p. 560,

> "But, however this may be, the figures discussed show that the regulation does affect a large and important class of business men not only Chinese, *but Filipinos as well although it may be that the burden falls most heavily upon the Chinese.* To require this number of business men to engage someone familiar with English or Spanish to keep a record for them which will comply with the regulation would in many instances impose a greater burden upon them than the entire amount of taxes which they have to pay."

It is significant that Filipinos as well as Chinese were affected by the disputed regulation. Moreover, the Philippine Supreme Court then saw no grave necessity for such an invasion of personal liberty, nor did the Court hesitate to recognize the injustice of imposing such requirements upon the Chinese merchants.

No construction can conceal the fact that this law is a blow aimed to drive out the Chinese merchant. That purpose cannot be effected in that fashion in the teeth of the Constitution, the Act of Congress and the Treaty. The Act is hence invalid and must yield.

CONCLUSION.

The decree of the lower Court should be reversed and a writ of prohibition directed to issue against respondents restraining them and each of them from enforcement of Act No. 2972, with such other and further relief as may seem just and proper.

Respectfully submitted, this 15th day of March, 1926.

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